IN THE MATTER OF

BEFORE THE

T-MOBILE NORTHEAST,

HOWARD COUNTY

LLC

BOARD OF APPEALS

Petitioner

HEARING EXAMINER

BA Case No. 09-043C

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DECISION AND ORDER

On February 1, 2010, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of T-Mobile Northeast, LLC, for conditional use approval of a Commercial Communications Tower and Commercial Antenna, specifically a 140-foot high monopole with three-foot high antennae and a fenced equipment compound in an RC-DEO (Rural Conservation-Density Exchange Option) Zoning District, filed pursuant to Section 131.N.14 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified to compliance with the advertising and posting requirements of the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Sean Hughes, Esquire, represented the Petitioner. Michael D. McGarity, Hillorie Morrison and Rajkanwar Bar testified on behalf of the Petitioner. No one appeared in opposition to the petition.

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the

following facts:

1. The Property. The 128.34-acre, irregularly shaped subject property is located in the 5th Election District on the west side of MD 94 (Woodbine Road), south of Old Annapolis Road and north of Florence Road. It is referenced on Tax Map 13, Grid 3, as Parcel 15, and is also known as 1960 Old Annapolis Road (the "Property"). The area of the proposed Conditional Use is 875 square feet (the "Site").

The Property is a large farm encumbered by an agricultural preservation easement. According to the Technical Staff Report ("TSR"), the Howard County Council and Agriculture Board approved the public interest use release needed to permit the proposed conditional use on the land subject to the easement. The farm comprises several large, irregularly shaped open fields close to the road frontages. A dense woods runs northwest to southeast through the Property's interior. Petitioner's Exhibit 2 (an aerial view of the Property), and Petitioner's Exhibit 3 (a Howard County flood map of the general area) illustrate how the woods borders both sides of a small stream, a tributary of Cattail Creek. According to Petitioner's Exhibit 4 (apparently part of an environmental study), a 100-year floodplain is associated with the stream, but the floodplain does not impact the Site, which will be located about 320 feet to its southwest.

A dirt and gravel farm road running through the Property provides access to three outbuildings. The main paved driveway leading to the principal dwelling on the Property is sited about midpoint on the Old Annapolis Road frontage. Parcel 323 lies wholly within the Property's southern, interior section portion and it is improved by a dwelling.

From Old Annapolis Road, the gently rolling topography slopes to the south and southwest.

- 2. <u>Vicinal Properties</u>. Adjacent properties are zoned RC-DEO. Across Old Annapolis Road to the northeast is Parcel 121, a 5.7-acre property improved with a single-family detached dwelling site about 700 feet from the proposed compound area. The nearest property line (On Old Annapolis Road) is about 433 feet from the compound area. To the east and fronting on Old Annapolis Road are Lots 3 and 5 of the Sartorio Property Subdivision. Lot 3 is improved with a single-family detached dwelling. Lot 5 is unimproved. Several small properties fronting on Florence Road are each improved with single-family detached dwellings. The proposed monopole would be sited more than 2,000 feet from these properties.
- 3. Roads. Old Annapolis Road has two travel lanes and about 22 feet of paving within a variable width right-of-way. The posted speed limit is 30 MPH. The estimated sight distance from the existing driveway entrance at Old Annapolis Road is about 350 feet to the north and 200 feet to the south. The TSR concludes sight distance for the proposed use is not an issue because it will generate minimal traffic. There is no current traffic volume data for Old Annapolis Rock. According to Department of Public Works data, the traffic volume on MD 94 north of Florence Road was 4559 average daily trips as of May 2006.
- 4. <u>Water and Sewer</u>. The Property is served by private water and sewer, neither of which is required by the use.

- 5. <u>General Plan</u>. Policies Map 2000-2020 of the 2000 General Plan designates the Property as "Rural Conservation." The General Plan Transportation Map depicts MD 94 as a Minor Arterial, Florence Road as Major Collector, and Old Annapolis Road as a local road.
- 6. The Proposal. The Petitioner is proposing to construct and operate a new commercial telecommunications facility, including a monopole, associated antennae and equipment compound in the Property's northeastern section in close proximity to the tree line and about 433 feet from the closest property on Annapolis Road (to the facility's northeast). The facility would comprise a 25-foot by 35-foot fenced, gravel surface compound housing multiple equipment cabinets and a 140-foot grey monopole and antennae, for a total height of 143 feet. The compound will be screened by a six-foot board on board gated fence and evergreen trees around the facility's two sides and rear. No tower lights are proposed unless required by the Federal Aviation Administration ("FAA"). The monopole will house six antennas, with the potential for three future antennae, and the compound will accommodate one additional carrier. The site will be accessed from the existing gravel driveway. The facility would operate continuously and automatically, with no employees on site except for infrequent maintenance visits.
- 7. Referring to Petitioner's Exhibit 6, a map depicting the location of area telecommunications towers, Ms. Morrison testified to their being either too distant or too low to meet the Petitioner's objective of increasing coverage in the area. No governmental structures are located in the area and a silo on Woodbine Road is not tall

enough.

8. Mr. Bar testified to the high number of dropped calls in the area and the reliance of T-Mobile customers on their phones for emergency calls.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude as follows:

I. General Criteria for Conditional Uses (Section 131.B)

A. Consistency with the General Plan

Section 131.B.1 requires me to evaluate whether the proposed conditional use plan will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district based on in which it is located. In making this evaluation, I am required to consider:

- a. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and
- b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.

General Plan Policies. The General Plan designates the area as Rural Conservation. Because the Property is a working farm, a typical rural use, and the proposed use complies with the criteria for commercial communications towers and antennas, I conclude it is in harmony with the General Plan.

The Nature and Intensity of the Use. In this case, the Petitioner is proposing a low intensity, passive utility occupying a small portion of the Property. It would make infrequent use of the compound.

The size of the site in relation to the use. The 875-square foot Site comprises a very small percentage of the 128.34-acre Property. The compound and monopole would be located more than 430 feet from the closest property line and about 700 feet from the nearest dwelling (excluding the internal parcel, which is part of the farm). The Site is an appropriate size in relation to the use.

The location of the site with respect to streets giving access to the site. The Site will be accessed from the existing driveway off Old Annapolis Road, which presumptively has a low traffic volume. The driveway's location appears to have adequate sight distance for infrequent visits to the compound and it also appears to be appropriately sized for the use, which will involve infrequent visits by Verizon Wireless employees, trucks and related equipment.

The appropriateness of the conditional use in combination with a permitted use on the site. The proposed facility will be combined with a permitted use, a large working farm surrounding the Site. The Site, 875 square feet, is very small, relative to the large size of the Property, and the proposed use greatly exceeds of setbacks.

2. Adverse Effect

Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured

under Section 131.B.2's four "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (d) access.

Any assessment of a conditional use under these criteria initially recognizes that virtually every human activity has the potential for adverse impact. Zoning recognizes this fact and, when concerned with conditional uses, accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before me is not whether the proposed use would have adverse effects in an RC zoning district. The proper question is whether there are facts and circumstances showing that the particular use proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a use irrespective of its location within the zone. People's Counsel for Baltimore County v. Loyola College in Maryland, 406 Md. 54, 956 A.2d 166 (2008); Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981); Mossburg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, I conclude the Petitioner has met its burden under Section 131.B.2 of the Zoning Regulations to establish this proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a commercial communications tower and antennae in an RC Zoning District.

a. Physical Conditions. Whether the impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.

There is no evidence the use would generate inordinate noise or other physical effects detectable from adjacent properties. I therefore conclude that any inherent operational adverse effects resulting from the proposed conditional use will not be greater at the subject site than elsewhere in the zone or applicable other zones.

b. Structures and Landscaping. The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

The proposed 143-foot monopole/antennae unit would be sited more 430 feet from the closest property line and about 700 feet from the nearest dwelling (excluding the internal parcel, which is part of the farm). The fenced facility is significantly beyond the 30-foot use setback requirement. The compound itself will be buffered by a fence and proposed landscaping and well buffered by distance and existing vegetation.

Because the dwellings on the other side of Old Annapolis Road sit at a higher elevation, the monopole and antennae will likely be visible. However, the uses will be buffered by distance and the monopole's close proximity to the tree line and no lighting is proposed unless required by the Federal Aviation Commission.

c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

The proposed driveway would provide adequate parking when access is needed.

The physical distance of the driveway and topographic conditions will provide sufficient screening.

d. Access. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.

The driveway appears to provide safe access, with adequate sight distance.

II. Specific Criteria for Communications Towers or Antennas (Commercial) (Section 131.N.14)

Section 131.N.14.a provides for the use in an RC Zoning District subject to compliance with the criteria in Section 131.N.14.b.

(1) An applicant for a new communication tower shall demonstrate that a diligent effort has been made to locate the proposed communication facilities on a government structure or, on an existing structure or within a non-residential zoning district, and that due to valid considerations, including physical constraints, and economic or technological feasibility, no appropriate location is available. The information submitted by the applicant shall include a map of the area to be served by the tower, its relationship to other antenna sites in the petitioner's network, and an evaluation of existing buildings taller than 50 feet, communication towers and water tanks within one-half mile of the proposed tower.

The Petitioner presented evidence and testimony demonstrating that area telecommunications towers were either too distant or too low to meet the Petitioner's objective of increasing coverage in the area. No governmental structures are located in the area and a silo on Woodbine Road is not tall enough.

(2) New communication towers shall be designed to accommodate antennas for more than one user, unless the applicant demonstrates why such design is not feasible for economic, technical or physical reasons. Unless collocation has been demonstrated to be infeasible, the conditional use plan shall delineate an area near the base of the tower to be used for the placement of additional equipment buildings for other users.

The proposed monopole is designed to accommodate at least one other telecommunications carrier and related ground equipment.

(3) Ground level equipment and buildings and the tower base shall be screened from public streets and residentially-zoned properties.

A high fence and landscaping will screen the equipment.

(4) Communication towers shall be grey or a similar color that minimizes visibility, unless a different color is required by the Federal Communications Commission or the Federal Aviation Administration.

The monopole would be grey or a similar color.

(5) No signals or lights shall be permitted on a tower unless required by the Federal Communications Commission or the Federal Aviation Administration.

No additional signals or lights are proposed.

ORDER

Based upon the foregoing, it is this 12th day of February 2010, by the Howard County Board of Appeals Hearing Examiner, ORDERED:

That the petition of T-Mobile for a 140-foot high commercial communications tower (monopole) with 3-foot high commercial antennae (a total height of 143 feet) and equipment compound in an RC-DEO (Rural Residential-Density Exchange Option Overly) Zoning District, is **GRANTED**;

Provided however, that;

- 1. The Conditional Use shall be conducted in conformance with and shall apply only to the proposed 143-foot monopole/antennae and equipment compound.
- 2. No additional lighting is permitted other than that required by the Federal Communications Commission or the Federal Aviation Administration.
 - 3. The monopole shall be grey or a similar color.
- 4. If no longer used, the communication tower shall be removed from the site within one year of the date the use ceases.

HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER
Michele L. LeFaivre

Date Mailed: 2 16/10

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.